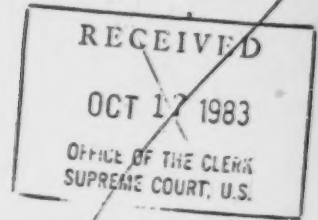


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No. _____

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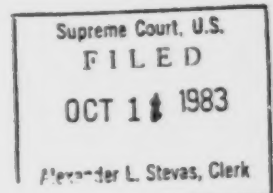


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JOSEPH ROBERT SPAZIANO,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.



=====

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I. Whether the death sentence imposed upon petitioner violates the Eighth and Fourteenth Amendment principles of Beck v. Alabama, where the jury in this capital prosecution was not instructed as to any lesser-included offenses for the reason that the statute of limitations had run as to those lesser offenses?

II. Whether, even if the principles of Beck v. Alabama were not held to preclude, as a matter of law, the death sentence imposed where the jury was precluded from considering lesser-included offenses, in affirming the death sentence, the Florida Supreme Court has adopted such a broad and vague application of the standards governing the decision to override a jury's life verdict so as to violate the Fifth, Seventh, Eighth, and Fourteenth Amendments?

III. Whether a trial judge's override of a jury's factually based decision against the imposition of the death penalty violates, in all cases, the Fifth, Seventh, and Fourteenth Amendments?

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II. In affirming petitioner's death sentence, the Supreme Court of Florida has adopted such a broad and vague construction of the standards governing the propriety of a death sentence imposed over a jury verdict of life imprisonment so as to violate the Fifth, Seventh, Eighth, and Fourteenth Amendments.11-24

A. This case presents a significant Federal Question.

B. The jury's sentencing verdict of life imprisonment was reasonable.

1. The lack of instructions on lesser-included offenses.

2. Weakness of Evidence of First Degree Murder.

3. Overriding the jury's reasonable verdict of life, cannot be justified by reliance upon aggravating circumstances based on evidence not before the jury.

C. Conclusion: The jury, not the judge, acted reasonably and constitutionally.

III. A trial judge's overriding a jury's factually based decision against the death penalty must, in all cases, violate the Fifth, Seventh and Fourteenth amendments to the Constitution of the United States.24-30

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B. The myth of judicial expertise in capital sentencing.

C. National practice.

D. Professional Legal Opinion.

E. Conclusion.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

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JOSEPH ROBERT SPAZIANO,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on May 26, 1983.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida, Case No. 50,250, is reported at 433 So.2d 508 (Fla. 1983) and is set out in Appendix A. The prior opinion of the Florida Supreme Court affirming petitioner's conviction, but vacating his death sentence, is reported as Spaziano v. State, 393 So.2d 1119 (Fla. 1981), cert. denied, 454 U.S. 1037 (1981).

JURISDICTION

The judgment of the Supreme Court of Florida was filed on May 26, 1983, and rehearing was denied on July 13, 1983. See Appendix B. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States. The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States, issued an order extending the time within which to file this petition to and including October 11, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the Constitution of the United States. It further involves Section 921.141, Florida Statutes (1977), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence". Because of its length, the statute is set out in its entirety in Appendix C.

This case also involves:

SECTION 932.465, FLORIDA STATUTES (1973)

Limitation of prosecutions.

(1) A prosecution for an offense punishable by death may be commenced at any time. (2) Prosecution for offenses not punishable by death must be commenced within two years after commission, but if an indictment, information, or affidavit has been filed within two years after commission of the offense and the indictment, information, or affidavit is dismissed or set aside because of a defect in its content or form after the two year period has elapsed, the period for commencing prosecution shall be extended three months from the time the indictment, information, or affidavit is dismissed or set aside.

RULE 3.490, FLORIDA RULES OF CRIMINAL PROCEDURE

If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.

STATEMENT OF THE CASE

On September 12, 1975, the prosecution against Joseph Robert Spaziano was commenced by the filing of an indictment for the capital felony of first degree murder for the killing of Laura Harberts alleged to have occurred on or about August 6, 1973 (T 1-2)¹.

Because the weakness of the state's case of first degree murder is relevant to an issue raised on this petition, that evidence will be discussed in some detail elsewhere in this petition. Briefly, the evidence revealed the following. On August 21, 1973, the decomposing corpse of a young woman was

¹ The symbols "T" and "R" respectively will be used herein to refer to the transcript of trial proceedings and the record-on-appeal in the Florida Supreme Court below.

discovered in a garbage dump in Seminole County, Florida. The deceased was identified, by dental records, as Laura Harberts, last seen alive, by her roommate, on August 5, 1973. The roommate testified that Ms. Harberts was dating a man named "Joe" and that the deceased and "Joe" had spoken by telephone on August 5th. The roommate also testified that she had met petitioner sometime in July, in the apartment that she shared with Ms. Harberts.

The state's chief witness was Anthony Dilisio. Dilisio, who was sixteen years old at the time of the events in question, testified that he accompanied petitioner to a dump. The ostensible reason for the excursion, according to Dilisio, was so petitioner could show him some of the women that petitioner had raped and tortured. Dilisio testified that he saw two female bodies situated in the dump. He did not report what he had seen to the police.

Dilisio admitted on cross examination that he regularly used L.S.D. and other drugs before the trip to the dump. Further, Dilisio stated in his deposition that he could not tell the authorities about the incident at the dump and the conversations with petitioner until after a session with a police hypnotist (R 80). Dilisio could not recall whether the hypnotist or the police suggested facts about his experience (R 82-85).

The Seminole County Medical Examiner testified that he conducted an autopsy the morning after the body was discovered (T 292). The doctor testified that the body was of a young adult female and was in an advanced stage of decomposition with half of the jaw separated from the skull (T 293). The doctor testified that an examination of the body revealed no evidence of trauma (T 294) and could not give an opinion as to the cause of death (T 298).

After the submission of evidence, outside the presence of the jury, the trial judge presented petitioner with the choice of waiving the statute of limitations which had run as to all lesser included noncapital offenses and having the jury instructed only as to first-degree murder. Petitioner chose the latter with the result that the jury was not permitted to consider verdicts of

guilt of lesser included, noncapital offenses (T 751-755). The jury, after deliberating more than five hours and after being given a "jury deadlocked" charge, returned a verdict of guilty of first-degree murder. The same jury recommended that petitioner be sentenced to life imprisonment, but that advisory verdict was overridden by the trial judge who sentenced petitioner to death. Thereafter, petitioner appealed his conviction and sentence to the Florida Supreme Court, which affirmed the conviction but reversed the death sentence for a violation of Gardner v. Florida, 430 U.S. 349 (1977), and remanded for a hearing before the trial judge. Spaziano v. State, 393 So.2d 1119 (Fla. 1981).

Petitioner then sought certiorari review by this Court of his conviction only. Certiorari was denied, but three Justices argued in dissent that this Court should grant plenary review to determine whether the trial court erred in refusing to instruct the jury on lesser included noncapital offenses. Spaziano v. Florida, 454 U.S. 1037 (1981).

A resentencing hearing was held on May 8, 1981 before a judge and without benefit of an advisory jury, pursuant to the Florida Supreme Court's limited remand. Despite the earlier jury verdict of life, petitioner was again sentenced to death.

Petitioner appealed his death sentence to the Florida Supreme Court, which affirmed. Spaziano v. State, 433 So.2d 508 (1983). Petitioner timely filed in this Court for certiorari review.

REASONS FOR GRANTING THE WRIT

1. THE AFFIRMANCE OF PETITIONER'S DEATH SENTENCE BY THE FLORIDA SUPREME COURT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT MANDATE OF BECK V. ALABAMA WHERE THE JURY IN THIS CAPITAL PROSECUTION WAS PRECLUDED FROM CONSIDERING ANY LESSER INCLUDED OFFENSE TO CAPITAL HOMICIDE.

The issue presented here requires resolution by this Court for it is of major constitutional significance and was decided below in a manner inconsistent with this Court's pronouncements. The federal question directly involves the constitutional dangers addressed in Beck v. Alabama, 447 U.S. 625 (1980) because petitioner, just as Beck, was precluded by operation of law from having his jury consider any offenses less than capital homicide.

At the close of evidence in petitioner's case, the trial court required petitioner to choose between having the jury instructed only as to first-degree murder, or waiving the applicable statute of limitations with respect to the lesser included noncapital offenses of second degree murder, third degree murder and manslaughter. The statute had run on these latter offenses. Petitioner refused to waive the statute of limitations, and so the jury was not instructed on the possibility that petitioner might be guilty of a lesser offense. After several hours of deliberation and an "Allen" charge, the jury convicted petitioner of first degree murder. Following trial on penalty, the jury, after a short period of deliberations, recommended life imprisonment.

This case has been before this Court previously and certiorari was not granted, though three Justices felt that plenary review would have been appropriate. Spaziano v. Florida, 454 U.S. 1037. There is, however, a critical difference between the posture of the case then and its posture now. Now it is before the Court with petitioner having been sentenced to death and with that sentence having been affirmed by the Florida Supreme Court. Where petitioner had been before this Court only for review of his conviction since the Florida Supreme Court had vacated his death sentence, he is now seeking review of the reimposed sentence of death. Thus, now this case is before this Court as

a death case, and it is a death case precisely because the trial court gave the jury only two options at the guilt stage: conviction of first degree murder or acquittal. The jury's sole safeguard against the overall weakness of the state's evidence was its advisory verdict of life imprisonment; the court's refusal to instruct on lessers eliminated any other such safeguards. This new posture brings the issue presented within the Eighth Amendment standards of reliability enunciated by this Court in Beck v. Alabama, supra.

The Florida Supreme Court, however, did not view this case as being at all affected by Beck. In affirming petitioner's conviction, that court held that:

... the Beck v. Alabama decision did not involve lesser included offenses for which the statute of limitations had run but instead concerned an express statutory prohibition on instructions for lesser included offenses when a defendant was charged with a capital offense. Whatever the implications of Beck v. Alabama may be, we do not find that it requires the jury to determine the guilt or innocence of lesser included offenses for which the defendant could not be convicted and adjudicated guilty.

Spaziano v. State, 393 So.2d 1119, 1122 (Fla. 1981). Following remand and reimposition of the death sentence, the Florida Supreme Court did not discuss petitioner's contention that the trial court's overriding the jury's life verdict was improper because of the factors identified in Beck.

The Florida Supreme Court's attempted distinction of this Court's holding in Beck on the reasoning that this case involves a failure to instruct on lesser offenses based on the operation of a statute of limitations rather than an "express statutory prohibition," represents a distinction without a difference. This is so because the result is identical: there is a risk of unreliability that is intolerable under the Eighth Amendment. The facts of this case embody the constitutional hazards identified by this Court in Beck despite the lower court's attempt to find a legal distinction.

The dangers sought to be averted by Beck's holding quite apparently came true in the present case. The jury, which had considerable difficulty in reaching a verdict on guilt after a

number of hours of deliberation interrupted with judicial inquiry, reported deadlock and an "Allen" charge, had little difficulty in issuing an almost immediate sentencing verdict of life imprisonment. The evidence supporting guilt was at best inconclusive -- there was virtually no evidence as to the degree of the homicide and only weak circumstantial evidence that petitioner was actually involved in the offense (see Point II, infra, at 17 for a detailed discussion of the evidence) -- yet the jury was faced with a murder that was portrayed as brutal and with only two options: guilty of first degree murder or not guilty. The jury did not have the "third option" mandated by Beck. Under these circumstances the jury exercised the only reasonable option it had available: it found petitioner guilty of first degree murder but issued a sentencing verdict of life imprisonment. This life verdict, however, was overridden by the trial judge who imposed the death sentence on petitioner. The Florida Supreme Court affirmed the death sentence.

Accordingly, the danger of unreliability came true in this case. The trial judge's instruction presented an impossible dilemma to the jury, a jury confronted with flimsy evidence of first degree murder. The refusal to instruct on lesser offenses prevented the jury from finding petitioner guilty of a lesser offense, which it had the exclusive right to do and for which there was a reasonable construction of the evidence. For example, the jury might well have believed that petitioner was somehow involved and knew about the homicide yet found the evidence insufficient to support the essential element of premeditation.² Since there were no lessers, the jury should have acquitted, yet, as this Court has recognized, where a defendant is guilty of some offense the jury is more likely to resolve its doubts in favor of conviction. Petitioner's jury had

² It is this lack of direct evidence and inconclusive character of the evidence that distinguishes this case from the situation present in Hopper v. Evans, 456 U.S. 605 (1982). Since there was no direct evidence as to the manner or cause of death, the jury quite easily (and probably) could have determined that the State failed in its burden to prove the mental element beyond a reasonable doubt. Thus, a verdict for a lesser offense, involving a lesser mental element, would be perfectly justified.